IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7630 OF 2004

1. Bee Fathima Wd/o. Mohammed Fakruddin Haji, Age 66 years, Occupation-Housewife,

2. Abdulla S/o.Mohammed Fakruddin Haji, Occupation - Business,

3. Nafeesa D/o.Mohommed Fakruddin Haji, aged 47 years, Occupation- Housewife.

4. Khalid Mohammed S/o.Mohommed Fakruddin Haji, aged 45 years, Occupation - Business, having their address at Islami Madani Restaurant, House No.419, 421 Maulana Azad Road, (Duncan Road), Mumbai 400 001.

Petitioners (Org.Defendants 1(a) to 1(d))

Vs.

1. Safubai Abbasbhai Bandukwala, Residing at Jyoti Sadan, Plot No.44, 28th Road, T.P.S.III Bandra, Bombay 400 050.

2. Mrs.Nadira Mustan Tambawala, Aged around 40 years, Occupation- Housewife, residing at A-61, Orchid Towers, Off Link Road, Yamuna Nagar, Oshiwara, Andheri, Mumbai 400 053.

3. Nasira Abbasbhai Bandukwala, Residing at Central View, 29, Souter Street, Bombay 400 008.

4. Fakruddin Sirajbhai Bandukwala, residing at Ghaletwala Chawl, Abdul Rehman Street, Bombay 400 003.

Respondents

(Org.Plaintiffs)

--

Shri R.A.Thorat for the petitioners.

Shri N.A.Bandukwala for the respondents.

--

CORAM : R.M.S.KHANDEPARKAR, J

DATED : 11th OCTOBER, 2004.

ORAL JUDGMENT:

1. Heard the learned advocates for the parties. Rule. By consent, the rule is made returnable forthwith. Perused the records.

2. The petitioners challenge the impugned order passed by the Courts below in relation to the premises which have been illegally constructed attached to the outer wall of the restaurant, which was the subject matter of the lease. It is the contention of the learned advocate for the petitioners that it was the case of the respondents themselves that the original defendant No.1 had constructed shops attached to the outer wall of the restaurant, and considering the definition of the "premises" under Section 5(8) read with Section 13(1)(b) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter called as "the said Act"), such structures constructed

attached to the outer wall of the premises could not give a ground for eviction under Section 13(1)(b) of the said Act. In order to attract the provision of Section 13(1)(b), it must be a demised premises and not beyond the demised premises. Undoubtedly, the pleadings in the plaint and the findings arrived at by the Courts below disclose that the stalls were constructed embedded in the outer wall of the structure which forms the subject matter of lease. At the same time, it was not the case of the petitioners at any point of time that the shops were erected in an area beyond the leased premises.

3. Section 5(8) of the said Act defines "premises" to mean any building or part of a building let or given on license separately other than a farm building, including the garden, grounds, garages and out-houses, if any, appurtenant to such building or part of a building. Being so, any land appurtenant to the building which has been the subject matter of the lease could form part of the demised premises. Section 13(1)(b) clearly entitles the landlord to seek eviction of a tenant if the later without the written consent of the former erects on the premises any permanent structure. Considering the definition of

the expression "the premises" under Section 5(8) of the said Act, the expression "premises" found in Section 13(1)(b) therefore would include the land appurtenant to the building which is the subject matter of the lease.

4. In the case in hand, the allegation made by and the evidence produced by the respondents in relation to the construction reveals that shops were constructed attached to the outer wall of the restaurant. Considering the area in which the shops are constructed is, undisputedly, an area appertenant to the demised premises. Being so, apparently, construction of shops was within the area comprised of leased premises as the leased premises include the land appertenant to it and the shops were constructed attached to the walls of the leased premises and therefore were in the area of the land appertenant to the leased premises.

5. Hence, bearing in mind the expression "premises" under Section 5(8) of the said Act and taking into consideration the facts of the case including the pleadings of the parties and the findings arrived at by the Courts below, it cannot be said that the alleged construction was beyond the

leased premises. Apart from that, the petitioners have not laid down any factual foundation to substantiate the plea sought to be raised in the petition.

6. It was also sought to be contended that the original proceedings suffer from misjoinder of cause of action. However, once it is found that the petitioners have not been able to make out a case on merits, merely because the plaint suffers from misjoinder of cause of action, that would not justify interference in writ jurisdiction. Even in the appeal, no such plea can be entertained nor the decree on that ground can be reversed or even varied in view of Section 99 of the Code of Civil Procedure. Being so, question of interference in such decree on the alleged ground does not arise at all.

7. It was also sought to be contended that the correspondence which was placed on record has not been considered in the manner the same was required to be considered while deciding the matter. The attention was drawn to the statement on behalf of the respondents in the affidavit filed by the defendants' witness No.4 wherein it was stated that "Serial No.2 letters are taken on record and marked Exh.'6'."

Undoubtedly, Exhibit-6 refers to list of documents taken on record and it contains correspondence. However, undisputedly, the petitioners did not make any effort to prove the contents of the alleged correspondence in the course of recording of the evidence. Mere placing the correspondence on record does not amount to proving the contents of such correspondence. It was necessary for the petitioners to prove the contents thereof as has been laid down by this Court in the matter of **Om Prakash Berlia & Anr. v. Unit Trust of India & Ors.,** reported in AIR 1983 Bombay 1.

8. As no other point has been canvassed to challenge the impugned order under Article 227 of the Constitution of India, the petition is liable to be dismissed and is accordingly dismissed with no order as to costs.

9. On oral request by the learned advocate for the petitioners, the execution of the impugned order shall stand stayed till 31st January, 2005 subject to the petitioners filing usual undertaking before the Registrar (Judl.) to the effect that the petitioners shall deliver vacant and peaceful possession of the suit premises to the respondents on or before the 31st

January, 2005 and meanwhile neither any third party interest in respect of the suit premises will be created nor any third party will be inducted therein nor shall part with possession of the suit premises in favour of any third party. Order accordingly.